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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-62, 75-66 and 75-278

RUSSELL L. RUNYON, et ux, *Petitioners,*

v.

MICHAEL C. McCRARY, etc., et al., *Respondents,*

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner,*

v.

COLIN M. GONZALES, etc., et al., *Respondents,*

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner,*

v.

MICHAEL C. McCRARY, etc. et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR COUNCIL FOR AMERICAN PRIVATE EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICI CURIAE

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MOTION OF COUNCIL FOR AMERICAN PRIVATE EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Council for American Private Education, National Association of Independent Schools and Southern Association of Independent Schools respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the position of respondents in these three cases.

Written consent to the filing of this brief was requested of the parties but has not been unanimously granted.

Identification of Amici Curiae. Each of the three organizations filing this Motion is, directly or indirectly, an association of private schools. Allowing for some overlapping in membership among them, amici curiae as a group include within their membership some 13,500 private schools, accounting for well over ninety percent of the non-public school enrollment in the United States.

The Council for American Private Education is an association of eleven groups, each of which is itself an association of private schools. The Council's member groups are the following:

American Lutheran Church, Division of Parish Education
American Montessori Society
Association of Military Colleges and Schools of the U.S.
Friends Council on Education
Lutheran Church - Missouri Synod, Board of Parish Education
National Association of Episcopal Schools
National Association of Independent Schools
National Catholic Educational Association
National Society for Hebrew Day Schools
National Union of Christian Schools
U.S. Catholic Conference.

The National Association of Independent Schools, the second of the amici curiae, has been in existence in its present form since 1962, when it resulted from a merger of two independent schools associations dating back to 1924 and 1942 respectively. Its membership consists of 725 elementary and secondary schools of various kinds throughout the U.S.: there are 64 Affiliate members, independent schools

outside the U.S.; and there are 56 Association members, made up of 35 state, regional and local associations of independent schools; 4 denominational associations; 10 special purpose associations; and 7 administrators' and teachers' associations. Almost all of the state, regional and local associations of schools are made up of schools which themselves are NAIS members.

The third of the amici curiae is the Souther Association of Independent Schools (not to be confused with the Southern Independent School Association, Intervenor below), the membership of which includes 138 private schools.

The Interest of Amici Curiae. In this case respondents, black children and their parents, claim that the refusal of petitioner schools to admit respondent children was because of race and constituted a violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Petitioner Southern Independent School Association (referred to herein as "SISA", in order to avoid confusion with amicus curiae Southern Association of Independent Schools) intervened in the District Court, claiming to represent "non profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents".

SISA has argued that 42 U.S.C. § 1981 should not be construed so as to prohibit racial discrimination by private schools, and that a construction that it does prohibit such discrimination would constitute a violation of rights of private schools, their students and parents, under the Constitution. Implicit in the assertions in SISA's pleadings in the District Court is that SISA speaks for and expresses the views of a significant segment of the community of private schools.

Amici curiae do not purport to speak for all private schools, or even all which are affiliated with them. They do, however, express the views of their associations, and of a very sizeable number of private schools which, in affiliating with one or more of amici curiae, have placed themselves on record as being unalterably opposed to the practice of racial discrimination against black persons in private education. They submit this brief in order to demonstrate that the associations representing the overwhelming percentage of private schools in this country believe that the decision below was correct, and that the application of 42 U.S.C. § 1981 to private schools does not constitute an unwanted or unreasonable interference with what they consider to be the legitimate operations or prerogatives of private schools. Amici curiae welcome the decision below as an added means by which the stain of racial discrimination in American education can be the sooner removed, and the opportunity of a private education be available to those black persons as well as those white persons who seek it and can qualify for it.

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This brief is filed by the aforenamed organizations, contingent upon the Court's granting the foregoing motion for leave to file a brief as amici curiae. The interest of the amici curiae is set forth in the motion.

INTRODUCTION

The purpose of this brief is to bring before the Court the point of view of amici curiae only on such issues in these cases as are particularly within their purview, and concerning which their first hand knowledge and experience may be helpful to the Court. Accordingly, and except for the following brief discussion, amici curiae will contend in this brief only that 42 U.S.C. § 1981,[1] as applied below, does not violate any constitutional rights of private schools or of those who attend them.[2]

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .". (42 U.S.C. § 1981).

[2] Except where otherwise indicated, the designation "private school" in this brief refers to schools which, though they render a public service recognized by governments, are private in the sense that they are not operated by government. In that sense, and that sense alone, petitioner schools are "private schools". The record in these cases indicates that petitioner schools solicited students from the general public, through the mails and through telephone directory advertising. It is clear, therefore, that petitioner schools are not "private" as that term is used in another sense (and as the term is frequently used in petitioners' briefs in this Court) to refer to the essentially personal relationship involved when a group of persons, usually small in number, having some common element of interest and known to each other, gather together for a social or similar common purpose. While the record does not set forth the size of each of the schools affiliated with SISA, it does indicate (SISA's Motion to Intervene, A. 121) that SISA's 395 affiliated schools have an enrollment of 176,000 students, which amounts to an average enrollment of well over 400 students. There can be no doubt that all, or the vast majority, of SISA schools, like petitioners and like the schools affiliated with amici curiae, while private in the non-governmental sense, are clearly *not* private in the latter sense.

The only other principal issue in these cases is whether Section 1981 was properly applied below to prohibit a refusal, because of race, to admit black persons to petitioner private schools. Amici curiae submit that this application was clearly correct, that it was required by prior decisions of this Court and that it is consistent with a growing body of federal cases applying Section 1981 in accord with the statement by this Court (describing the Act of Congress in which Section 1981 first appeared) that it "meant exactly what it said". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968).

That Section 1981 reaches beyond state action and operates upon the unofficial acts of private individuals has been settled beyond question by this Court, in *Jones v. Alfred H. Mayer Co., supra, Tillman v. Wheaton Haven Recreational Association, Inc.*, 410 U.S. 431 (1973), and *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).[3] This Court has also recently expressed its approval of the application of Section 1981 to prohibit private racial discrimination in employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). In addition to the many cases applying the statute to contractual employment relationships, including those cited by the Court in *Johnson*, Section 1981 has been applied by the lower federal courts to other contractual relationships, including admission to a privately owned amusement park, *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), cert. denied, 398 U.S. 929 (1970); the right to purchase an accident insurance policy, *Sims v. Order of United Commercial Travelers of*

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[3] While the holdings in *Jones* and *Sullivan* involved 42 U.S.C. § 1982, this Court said in *Tillman* that since both sections derived from the same statute, the Civil Rights Act of 1866, they should receive similar interpretations. See 410 U.S. at 439-440.

America, 343 F. Supp. 112 (D. Mass. 1972); and the right to admission to a privately owned trade school, *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971). Petitioner SISA argues that since a contract requires the assent of both parties, no white person has a "right" to contract to attend a private school, and therefore a black person denied admission because of race is not denied a right "to make and enforce" a contract protected by Section 1981. The fact is that a black person who is excluded because of race is, as the court below observed (A. 13), "denied a contractual right which would have been granted to him if he had been white", and such a contractual right must be held a right protected by Section 1981 or the statute becomes a nullity.

There is nothing before this Court which would warrant treating the school contracts in these cases in any different manner than the contracts in those cases in which Section 1981 has already been applied, unless to do so would impinge upon a right guaranteed by the Constitution. For the reasons set forth in the following argument, amici curiae contend that no such violation of constitutional rights is involved.

ARGUMENT

APPLICATION OF 42 U.S.C. §1981 SO AS TO PROHIBIT REJECTION BY PETITIONER SCHOOLS OF RESPONDENT CHILDREN BECAUSE OF THEIR RACE DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF THE SCHOOLS, CHILDREN WHO ATTEND THEM, THEIR PARENTS, OR PRIVATE SCHOOLS GENERALLY.

The constitutional right of private schools to exist, and of parents to send their children to attend them rather than attending public schools, was clearly decided by this Court some fifty years ago, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and reaffirmed frequently since then, most recently in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As associations of private schools, amici curiae look upon *Pierce* and its progeny as establishing a "bill of rights" for private schools, and as rightfully recognizing the unique and important role of private schools in our system and the contribution which they make to American education. Accordingly, amici curiae would be the last to question the validity or the vitality of these cases. But, as pointed out by the Chief Justice in *Norwood v. Harrison*, 413 U.S. 455 (1973), a case upon which petitioners rely heavily, "the Court's holding in Pierce is not without limits", and (quoting from Mr. Justice White in *Yoder*) "*Pierce* 'held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools' ", 413 U.S. at 461. Thus, while *Pierce* and *Yoder* establish very clearly the right of private schools to exist, they do not establish any right of private schools to be free from reasonable legislative regulation.

Private schools have been held subject to regulations concerning their educational adequacy, failing which attendance at the private school is held not a defense to an action under a state compulsory attendance law. See, for example, *State v. Superior Court*, 55 W. 2d 177, 346 P. 2d 999 (1959), cert. denied sub. nom. *Wold v. Shoreline School District*, 363 U.S. 814 (1960); *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962). And private schools, like many other private institutions, are subject to reasonable regulation by state or federal government in furtherance of legitimate legislative purposes and provided that constitutional rights are not violated. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926), *aff'd* 273 U.S. 284 (1927); *Zucht v. King*, 260 U.S. 174 (1922); *State v. Williams*, 253 N.C. 337, 117 S.E. 2d 444 (1960).

There being no doubt that Section 1981 was validly enacted by Congress under authority of the Thirteenth Amendment, *Tillman v. Wheaton Haven Recreational Association, Inc., supra*, there is no question in this case as to the legitimate legislative purpose of this statute. Accordingly, the only question is whether the statute as applied below violates a recognized constitutional right.

In order for this Court to consider this issue, it must first consider precisely how Section 1981 affects private schools. And in view of some of the extravagant assertions of petitioners concerning the impact of the law, it will be helpful to approach this issue in terms of what Section 1981 does *not* do, as well as in terms of what it *does* do. Since the effect upon petitioners is also the effect upon our affiliates, amici curiae have a particular

interest in a clear understanding of the limitations of this law.

In the first place, it is clear that the statute in no way prohibits the right to teach unpopular theories concerning race, concerning the value or the harm of racial segregation, or concerning anything else. Any suggestion to the contrary is without foundation. Amici curiae, some of whose affiliates represent groups which historically have been minorities in one country or another and at one time or another, are as sensitive as anyone, and perhaps more than most, to the importance of freedom of thought and freedom to teach, particularly where the education of young people is involved. Amici curiae would resist any effort on the part of government to control thought processes and teaching in their schools and elsewhere, and would be among the first to challenge any law which had such an effect, whether the limitation was directed to beliefs which they found compatible, or, as would be the case with the beliefs espoused by SISA in its brief in this Court, ones with which they are in sharp disagreement. But amici curiae support the decision below without reservation because it is clear from the wording of Section 1981 and from the decision that the freedom to teach or speak about ideas or theories, *any* ideas or theories, is in no way limited by this statute as here applied.

Secondly, the statute as applied below places no limitation on the simple right to associate in private for educational or any other purposes. The only issue at stake in these cases is the applicability of Section 1981 to schools which solicit students from the general public and which are concededly open to all qualified white persons but closed to all black persons, no matter how highly qualified.

While a court may some day have to decide the constitutional bounds of Section 1981, if it is ever sought to be applied to strictly private activity,[4] that issue is not before the Court in this case.

Thirdly, while Section 1981 prohibits one criterion for admission to a private school, namely the race of the applicant, it places no limitation on any other criteria which a private school may choose to use, whether of a kind generally used by private schools, such as test performance, geographic location, ability to pay, willingness to abide by rules and regulations, etc., or whether, for that matter, of a kind *not* generally used by private schools, even a kind which could be considered arbitrary or unrelated to the usual purposes of private schools.

Fourthly, Section 1981 places no limitation on the right of a private school to concentrate its curriculum in such a way as to appeal to a particular religious or nationality group, or any other group and to seek applications from a particular segment of the population which might be expected to want that kind of particularized education. If schools which belong to SISA, for example, wished to concentrate their curriculum on studies in furtherance of their particular point of view, and to solicit students who might have a special interest in such studies, Section 1981 would not restrict such activity so long as the contract of admission was not denied to a black person who might wish to attend.

In short, the single effect of Section 1981 upon petitioner schools or upon any private school is to prohibit a refusal to admit a student solely because he or she is

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[4] See Footnote 2 *supra*.

black. With that in mind, we turn to petitioners' contention that this single limitation on their freedom of action is in violation of the Constitution.

The fact that Section 1981 places no limitations whatever upon the rights of free speech and free expression distinguishes this case from most of those upon which petitioners rely. Application of Section 1981 so as to prohibit racial discrimination by a private school does not involve a state enforced punishment because of one's beliefs or associations, as was so in cases cited by SISA, *United States v. Robel*, 389 U.S. 258 (1967), *Murray v. Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971), and *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (denial of employment), *Schneiderman v. United States*, 320 U.S. 118 (1943) and *United States v. Korner*, 56 F. Supp. 242 (S.D. Cal. 1944) (revocation of naturalization), *Schneider v. Smith*, 390 U.S. 17 (1968) (denial of a license), *Bond v. Floyd*, 385 U.S. 116 (1966) (denial of right of elected official to take a seat in the state legislature to which he was elected), *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) (public disclosure of membership in an association of minority advocates, where this Court found that such disclosure was "likely to affect adversely the ability of [the association]and its members to pursue their collective effort to foster beliefs which they admittedly have a right to advocate", 357 U.S. at 462-463).

Whether or not there is a constitutionally-protected right of association which does not involve a right of free speech or expression or the advocacy of beliefs, there is no basis for the assertion of such a right in these cases. There is nothing in the record to indicate that petitioner schools involve any kind of "association" at all, at least as that term is normally understood. They are more properly viewed as institutions performing a quasi-public func-

tion, not established by the parents of children attending them, but established and operated by others, and which solicit their clientele much like any commercial enterprise, rather than having been formed by their membership.[5] The dissenting opinion in the court below suggests that the protection of Section 1981 should be limited to "secondary relationships", and that the statute should not be applied to "primary relationships". Even if such a distinction has a proper basis in the Constitution, which we question, amici curiae submit that the facts in the record place petitioner schools clearly beyond the scope of "primary relationships", which are defined as "basically relationships between friends, characterized by intimate association".[6] Schools which solicit students from the general public, by way of newspaper and "yellow page" advertisements, can hardly be referred to an involving relationships between friends or as "intimate." They involve no more "plan or purpose of exclusiveness" than did the discriminating organizations in *Sullivan v. Little*

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[5] The average size of the SISA schools (over 400) strongly suggests that they are similar to petitioner schools in these respects. See footnote 2 *supra.*

[6] The distinction between "primary" and "secondary" relationships is attributed in the dissenting opinion below to a comment, *Segregation in Private Schools*, 122 U. Penna L. Rev. 471, at 478, 479 (1973). The Comment, in turn, attributes the concept to Sengstrocks, *Discrimination: A Constitutional Dilemma*, 9 Wm. & Mary L. Rev. 59, 117 (1968). It appears from the Sengstrocks article that the concept was originated by the sociologist, Charles Cooley, in his *Social Organization* (1909), and the examples of "primary relationships" given by Sengstrocks are those which one has "with his spouse, his closest friends, his parents, and perhaps his siblings". 9 Wm. & Mary L. Rev. at 117. Clearly no such relationship is involved between a school and its students.

Hunting Park, supra, or *Tillman v. Wheaton Haven Recreational Association, Inc., supra.* See 396 U.S. at 236, and 410 U.S. at 438. The majority decision below properly characterized petitioner schools as

> "private only in the sense that they are managed by private persons and they are not recipients of public funds. Their actual and potential constituency, however, is more public than private". (A. 17)[7]

Nor can petitioner schools bring themselves within the scope of a constitutionally protected right of privacy such as that involved in *Griswold v. Connecticut,* 381 U.S. 479 (1965), where the Court afforded constitutional pro-

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[7] Petitioner, SISA, argues (pp. 12-14 in the brief in No. 75-278) that this Court has thrice held that SISA's member schools "constitute a permissible expression of the parents' freedom of association", relying on *Norwood v. Harrison,* 413 U.S. 455 (1973), *Gilmore v. City of Montgomery,* 417 U.S. 556 (1964) and *Coit v. Green,* 404 U.S. 997 (1971), affirming *Green v. Connally,* 330 F. Supp. 1150 (D.D.C. 1971). SISA's contention that this issue was "necessarily decided by this Court" in those cases, it totally erroneous. The most that can be said is that the three decisions assume that the discriminatory policies of SISA schools do not in themselves violate the constitutional rights of anyone. The issue before this Court in this case, however, is whether SISA's discriminatory policies are immune from the legislative prohibition on discrimination found in Section 1981. This issue was not involved in any way in *Norwood, Gilmore* or *Green.* Indeed, in *Green,* the District Court, after referring to the interest of a state in preventing racial discrimination, indicated that "whether such a state interest is sufficiently compelling to justify outright prohibition of racial discrimination in education by private or public schools . . . is a matter we are not called upon to determine in this case". 330 F. Supp. at 1168.

tection to the unique, intensely personal and intimate relationship of the partners to a marriage. The marriage relationship derives from state action, and it could hardly be contended that the relationship is free from any legislative regulation. But the regulation in that case, a prohibition on the use of contraceptives, clearly went to the heart of the most personal and private aspect of the marriage relationship – indeed, as this Court found, the regulation had a "maximum destructive impact" on that relationship, 381 U.S. at 485. No such intimate relationship and no such destructive impact is involved here.

The right to associate for the purpose of free speech or political advocacy, and the intimate and very private association of the marriage relationship, are clearly distinguishable from the right to operate a school which seeks students from the general public. And a legislative limitation which affects the right to operate such a school in but one respect, i.e., prohibiting the exclusion of one class of citizens, is clearly distinguishable from legislative limitations, such as those in *Griswold*, which significantly impaired the association or relationship found to be entitled to constitutional protection.

In the final analysis, the constitutional right asserted by petitioners comes to nothing more than the right of schools to practice racial discrimination, and (assuming that petitioner schools and SISA have standing to raise it) the right on the part of students to attend all-white classes. Amici curiae submit that a prohibition of the "right" to discriminate against black persons because of their race cannot be considered a fundamental deprivation of the right to associate as a private school. Amici curiae, and the schools affiliated with them, have demonstrated by their own actions that they do not consider the right to

discriminate against black persons, or, for that matter, the right to discriminate against any particular group, as essential to any legitimate rights of private schools. Indeed, they consider that discrimination in schools, both private and public, has been detrimental to, rather than supportive of, what they regard as the proper goals of private education in America.

Thus, the principle of nondiscrimination on the grounds of race is not only one to which the organizations affiliated with amici curiae subscribe, but it is a stated principle adopted by all members of the Council for American Private Education; it is a stated principle which is a requirement for all members of the Southern Association of Independent Schools, notwithstanding the location of such schools in the same area of the country as the schools which are affiliated with SISA; and it is a stated principle which is a requirement for all schools affiliated with the National Association of Independent Schools. Moreover, a number of affiliates of amici curiae, recognizing the legacy of slavery and of the discrimination practices against blacks in this country since slavery, in the field of education, both public and private, as well as in other areas, have adopted or supported various programs seeking not only the implementation of policies of nondiscrimination, but affirmative action programs designed to create educational opportunities for minority students, particularly black students.[8] Amici curiae do not make these repre-

[8] Some examples of these principles and programs are as follows:

– An applicant for admission to the National Association of Independent Schools must submit a statement "that the school's policies provide for admission of students & employment of personnel without regard to race or color (if not contained in the school catalogue)";

(Continued)

sentations to the Court for the purpose of exhibiting a "holier than thou" attitude, or to flaunt obedience to what the courts below have held to be the law of the land. They do so, rather, to demonstrate that the application of Section 1981 to private schools is in harmony with, not in opposition to, the policies and practices of a very large number of private schools, and that depriving private schools of the "right" to discrminate against black persons does not deprive them of any right which is essential to their operations or to the principles of their independence which they hold dear.

Amici curiae submit that the language from this Court's decision in *Norwood v. Harrison*, relied upon by petitioners to support their claim of a constitutional right to discriminate, in fact demonstrates its invalidity:

> "In contrast, although the Constitution does not proscribe private bias, it places no value

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[8](Continued)

- NAIS or its affiliates have supported such outreach programs as A Better Chance, Inc., Broad Jump, Inc., the Independent Schools Opportunity Project, the Black Student Fund, the Supplementary Program of Hartford in Education Reinforcement and Enrichment, the Minority Teacher Recruitment Program;
- A policy of admission without regard to race or color was urged upon its affiliates by the Southern Association of Independent Schools in 1969, and became a requirement for admission to the Association in 1971;
- The constitution of the National Association of Episcopal Schools, Inc. states, paragraph 2, that a school eligible for voting membership in the Association shall be one "whose admission policies do not exclude any candidate on the basis of race or color".

> on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, *but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under Sec. 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts".* 413 U.S. at 469-470 (emphasis added).

The positive constitutional importance of anti-discrimination laws was characterized by the Court in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub. nom. *Coit v. Green*, 404 U.S. 997 (1971), in the following language:

> "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That governmental interest is dominant over other constitutional interests to the extent that there is a complete and unavoidable conflict." 330 F. Supp. at 1167.

The "right" to attend a segregated school should have no more claim to constitutional protection than the "right" to live in an apartment building which refuses to admit

black tenants, or the "right" to work at a factory which refuses to employ black workers or the "right" to stay in a hotel or eat in a restaurant which refuses to serve black customers.

Even if Section 1981 as applied below involved some impingement upon a constitutionally recognized right of association, this Court would nevertheless have to weigh the impact of that impingement against the substantiality of the reasons advanced in support of the law. See *United States v. Robel*, 389 U.S. 258, 264-5 (1967); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958); *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939).

In a footnote to the passage from *Norwood v. Harrison* quoted on pp. 18, 19 *supra*, the Chief Justice cited *Griffin v. Breckenridge*, 403 U.S. 88 (1971), *Jones v. Alfred H. Mayer Co.*, *supra*, the federal public accommodations law (42 U.S.C. §2000a et. seq.), the federal law against discrimination in employment (42 U.S.C. §2000e et. seq.) and the federal fair housing law (42 U.S.C. §3601 et. seq.) as examples of remedial legislation against discrimination and cases thereunder, 413 U.S. at 470. When federal laws which protect the rights of black persons against private racial discrimination have been contested in the courts, frequently in the face of arguments similar to petitioners', that they impinge impermissibly upon the rights of those charged with discrimination, they have been uniformly upheld, in the cases cited by the Chief Justice and in others such as *Tillman v. Wheaton-Haven Recreational Association, Inc.*, *supra*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

While the Court has interpreted the Constitution as providing the maximum freedom from unnecessary or unreasonable governmental limitations on private activity, it has recognized that the minimal limitations on private activity which are imposed by anti-discrimination laws are clearly justified by the overriding necessity to take meaningful steps to eliminate the discriminatory practices which have caused such hardship to so many for so long.

CONCLUSION

For the reasons set forth above, in addition to the reasons set forth in respondents' brief, amici curiae ask that the decision of the Court below be affirmed.

Respectfully submitted

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